

1  
2  
3  
4  
5  
6  
7 ENERTRODE, INC.,  
8 Plaintiff,  
9 v.  
10 GENERAL CAPACITOR CO. LTD, et al.,  
11 Defendants.

Case No. [16-cv-02458-HSG](#)

**ORDER REGARDING PLAINTIFFS'  
MOTION TO EXCLUDE LATE-  
EXCHANGED EXHIBITS; ORDER TO  
SHOW CAUSE**

Re: Dkt. No. 260

12  
13 **I. INTRODUCTION**

14 Plaintiffs seek exclusion of Defendants' trial exhibits 800–870, which Plaintiffs argue were  
15 untimely exchanged because Defendants did not identify them at least 28 days before the initial  
16 pretrial conference on July 17, 2018. Dkt. No. 260 ("Motion"). Defendants argue that they timely  
17 submitted the exhibits in question. Dkt. No. 266 ("Opposition"). Based on the materials  
18 submitted, both parties appear to misrepresent the record in significant ways in their papers.

19 **II. LEGAL STANDARD**

20 Federal Rule of Civil Procedure 26(a)(3)(A)(iii) provides that "a party must provide to the  
21 other parties and promptly file . . . an identification of each document or other exhibit, including  
22 summaries of other evidence—separately identifying those items the party expects to offer and  
23 those it may offer if the need arises." Rule 26(a)(3)(B) provides that the district court may  
24 establish deadlines for such disclosures. And consistent with that authority, this Court's Civil  
25 Pretrial Standing Order provides that "[a]t least 28 days before the Pretrial Conference, each party  
26 shall provide every other party (but not the Court) with one set of all proposed exhibits, charts,  
27 schedules, summaries, diagrams, and other similar documentary materials to be used in its case in  
28 chief at trial, together with a complete list of all such proposed exhibits." Civil Pretrial &

1 Standing Order for Cases Before District Judge Haywood S. Gilliam, Jr. ¶ 3.

2 Rule 37(c)(1) provides: “If a party fails to provide information or identify a witness as  
3 required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply  
4 evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is  
5 harmless.” In addition, or instead, the court may also impose other appropriate sanctions provided  
6 for in Rule 37. *See Fed. R. Civ. P. 37(c)(1)(A)-(C).* “The party facing sanctions bears the burden  
7 of proving that its failure to disclose the required information was substantially justified or is  
8 harmless.” *R & R Sails, Inc. v. Ins. Co. of Pa.*, 673 F.3d 1240, 1246 (9th Cir. 2012).

9 Rule 37(c)(1) “gives teeth” to Rule 26’s disclosure and supplementation requirements. *Yeti*  
10 *by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). The Advisory  
11 Committee Notes to the 1993 amendments to Rule 37 describe subsection (c)(1) as a “self-  
12 executing,” “automatic sanction [that] provides a strong inducement for disclosure of material”  
13 that must be disclosed pursuant to Rule 26. Rule 37(c)(1) sanctions based on failure to disclose  
14 evidence in a timely manner may be appropriate “even when a litigant’s entire cause of action or  
15 defense” will be precluded. *Yeti*, 259 F.3d at 1106.

16 **III. DISCUSSION**

17 Plaintiffs’ counsel contends that the parties exchanged proposed trial exhibits and exhibit  
18 lists on June 23, 2018, but that then “a month and a half later, on August 9, 2018, the GC  
19 Defendants purported to ‘add’ some seventy-one (71) new exhibits.” Motion at 2 (citing Battin  
20 Decl. and exhibits). Counsel claims that “[t]he added exhibits showed up as exhibits J0800-870 in  
21 the Corrected Proposed Joint Trial Exhibit List.” *Id.*

22 In response, Defendants’ counsel states, with evidentiary support, that he “added exhibits  
23 800-844 to the exhibit list on July 17, 2018 pursuant to discussions between counsel that the list  
24 was to be updated.” Opposition at 1 (citing Conwell Declaration and Exhibit 2).

25 Plaintiffs’ counsel’s representations gravely concern the Court. It is disingenuous at best,  
26 and affirmatively misleading at worst, to omit the July 17 exchange in bringing this motion.  
27 Plaintiffs’ counsel is ORDERED TO SHOW CAUSE at 8:00 a.m. on November 13, 2018 why he  
28 should not be sanctioned for omitting the July 17 exchange from his motion and declaration.

1       For their part, Defendants do not present any actual justification for their failure to comply  
2 with the Standing Order (beyond, perhaps, “the parties both agreed not to comply with the order”).  
3 Instead, Defendants first claim that they in fact complied with the Standing Order, for various  
4 technical reasons, none of which the Court finds persuasive. For example, Defendants claim that  
5 the first pretrial conference in this case was not, in fact, a pretrial conference, because a minute  
6 entry on the docket “states that the July 17, 2018 hearing was not a pretrial conference.”  
7 Opposition, at 2. That is, plainly, false. The minute entry in question is unambiguously to the  
8 contrary: “Pretrial Conference held and Motion Hearing NOT held on 7/17/2018.” Dkt. No. 208.  
9 The Court can see no good-faith basis for counsel’s claim otherwise.

10      Defendants also maintain that at the July 2018 pretrial conference, the Court granted the  
11 parties free rein to revise all pretrial filings until a later date. *See* Opposition, at 2. That is  
12 incorrect. At that pretrial conference, the Court acknowledged the parties’ indication that there  
13 were outstanding disputes regarding some pretrial matters, and directed the parties to resolve those  
14 outstanding disputes before the next pretrial conference. Defense counsel said that the issues  
15 concerned the “jury instructions” and “verdict form.” Dkt. No. 268 at 12:16–17, 12:21–22. To  
16 the extent “exhibit issues” were mentioned at all, counsel said the purported dispute concerned  
17 “our current exhibits.” Dkt. No. 268 at 12:17–18, 12:23–13:1. Defendants’ counsel failed to point  
18 out this obviously relevant section of the transcript in the Opposition. Nothing in the exchange  
19 that actually occurred amounted to an open-ended invitation to *add* a large number of exhibits  
20 later. The entire point of the Standing Order requirement is to force the parties to identify and  
21 disclose, well before the pretrial conference, the exhibits they actually propose to use in their case  
22 in chief, so that any issues can be identified and resolved by the Court in an orderly way. The  
23 fortuity that at the pretrial conference the Court continued the trial date is irrelevant to whether  
24 Defendants complied with the Standing Order. Plainly, they did not. The only question is what  
25 sanction is warranted for that noncompliance.

26      Because Plaintiffs’ counsel did not accurately represent the relevant facts in its motion, the  
27 Court is not in a position to rule on the motion to exclude Exhibits 800-844 (which were produced  
28 after the deadline in the Standing Order, but clearly with the knowledge and apparent

1 acquiescence of Plaintiffs' counsel). As to Exhibits 845–867, Plaintiffs do not explain why it did  
2 not object to what it now claims was a late disclosure anytime between August 9 and October 30,  
3 or explain in any detail what prejudice it sustained based on the timing of the disclosure given the  
4 November 13 trial date. The parties must be prepared to discuss these issues at 8:00 a.m. (or  
5 earlier if so ordered) on the first day of trial.

6           The Court will demand scrupulous candor, forthrightness, accuracy and the highest  
7 standard of professionalism from all counsel in this trial. Counsel are on notice that they must  
8 conduct themselves accordingly, and the Court will not tolerate half-truths or mischaracterizations  
9 of the record. All counsel are directed to share this order with their clients.

10           **IT IS SO ORDERED.**

11           Dated: 11/8/2018

  
12           HAYWOOD S. GILLIAM, JR.  
13           United States District Judge